STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Fort Hood, P.J., Cavanaugh and K.F. Kelly)

2000 BAUM FAMILY TRUST, BAUM FAMILY TRUST; JOSEPH BEAUDOIN and SANDRA BEAUDOIN, husband and wife; ADELE MEGDALL REVOCABLE TRUST; PAUL NOWAK and JOAN NOWAK TRUST; MARILYN ORMSBEE; MARK SCHWARTZ and WENDY SCHWARTZ, husband and wife; and THOMAS THOMASON;

Plaintiffs/Counter-Defendants/Appellants,

v

WILLIAM AND JUDY BABEL, husband and wife, JAMES CAHILL and GLORIA CAHILL, husband and wife, JAMES EHINGER and MARY ANN EHINGER, husband and wife, DANIEL ENGSTROM and PENNY ENGSTROM, husband and wife, THOMAS HELZERMAN and PATSY HELZERMAN, husband and wife, SHAUN MacMILLAN and RACHEL MacMILLAN, husband and wife, DAVID OSHABEN and PAMELA OSHABEN, husband and wife, MARION PARKER, SALLY J. SIPPEL, DOUGLAS H. PHILP, JR. and NANCY M. PHILP, husband and wife, ARTHUR A. RANGER, Trustee of the Arthur A. Ranger Trust, PATRICIA L. RANGER as Trustee of the Patricia L. Ranger Trust, GAYLE SHELDON and SHERRY SHELDON, husband and wife, and CHARLEVOIX COUNTY ROAD COMMISSION,

Defendants/Counter-Plaintiffs/Appellees,
and

AL GOOCH and ELIZABETH GOOCH, husband and wife, JESSE HALSTEAD and LINDA HALSTEAD, husband and wife, MICHAEL MacMILLAN and KAYE MacMILLAN, husband and wife, ROBERT SCHOFIELD and KATHY SCHOFIELD, husband and wife, RICHARD BERGLUND and LINDA BERGLUND, husband and wife, ROGER NESBURG and ANNETTE NESBURG, husband and wife, THOMAS E. BERGMANN, LOUIS M. SAPS, ELTON WILKERSON and JUDY WILKERSON, husband and wife, MARTY JENSEN, and DAVID NIEWICK and WENDY NIEWICK, husband and wife,

Intervening Defendants/Counter-Plaintiffs/Appellees,
and

CHARLEVOIX TOWNSHIP, EDWARD ENGSTROM, RICHARD SAYWARD, JOHN DOE and JANE DOE,

Defendants-Appellees.

Supreme Court No. 139617
Court of Appeals No.: 284547

Charlevoix County Circuit
Court No. 07-611-21-CH

BRIEF OF AMICUS CURIAE COUNTY ROAD COMMISSION OF MICHIGAN

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IDENTITY OF AMICI

On January 27, 2010, this Court granted the Appellants Application for Leave to Appeal following the June 23, 2009 decision by the Court of Appeals in which the County Road Association participated as an amicus curiae. In its January 27, 2010 Order, the Court invited other persons or groups interested in the determination of the questions presented to file briefs amici curiae.

Pursuant to the Court's request for briefs by other persons or groups interested in the determination of the questions presented, the County Road Association of Michigan ("CRAM") submits their brief amicus curiae under MCR 7.306(D)(2) as an association representing county road commissions.

County Road Association of Michigan

CRAM is a statewide organization whose membership includes every county road commission within the State of Michigan, as well as those counties that elected the charter form of county government and whose county road system is managed as a department of county government. All 83 Michigan counties are members of CRAM. Michigan's extensive county road system totaling 89,750 miles under the exclusive jurisdiction of CRAM's members represents 73 percent of Michigan's extensive network of 122,722 miles of highways, roads and streets that link every part of the 37.2 million square acre land surface on Michigan's two peninsulas.

CRAM's main purpose is to promote higher efficiency in the operation of the county road systems within each Michigan county through the cooperative efforts of its members. CRAM represents the interests of its members on a variety of operational, jurisdictional and financial issues in the state Capitol.

INTEREST OF AMICI

One issue that concerns each county within Michigan, notwithstanding its size, is the nature of the fee interest in property within a plat statutorily dedicated to the public for use as road.

Throughout Michigan's history of road development, the legal concepts of dedication and acceptance of property for public highway use has changed very little. Under those legal concepts, county road commissions, townships, cities and the State Department of Transportation have created an infrastructure of public highways which help to advance commerce and recreation. Local government officials estimate that approximately fifteen percent of local roads and streets in existence are within recorded plats.

Dedicated streets in plats adjacent to lakes that served vacationers one hundred years ago, now serve year round residents who live in homes in these plats as well as people who live in adjacent areas that have since developed. Currently the same streets in subdivisions platted under 1887 PA 309, (the "1887 Plat Act") and the other Pre 1967 Acts serve far more vacationers and year round residents who drive much larger vehicles than when these plats dedicated under the 1887 Plat Act were first developed.

When county road commissions maintain, repair and upgrade roads and streets under their jurisdiction, the question regarding the nature and extent of the right-of-way is of critical importance. The scope of a repair or improvement will be dictated by the amount of available right-of-way and the cost of acquiring additional right-of-way, especially when the acquisition of additional right-of-way is expensive riparian land adjacent to a desirable recreational lake.

Where a road commission holds the right-of-way in fee its rights within the full width of the right-of-way are clear and not subject to challenge. Road commissions have the broad authority to control the right-of-way under their jurisdiction. The owner of the fee over which a highway runs

may occupy the area of the easement outside of the traveled portion in a way that is not incompatible to the public use of road such as to landscape, and even allow grazing so long as those uses do not interfere with the paramount right of the public to travel over the road. 12 Mich Civ Jur Highways and Streets, § 446. However, should this Court decide that the interest held by the county road commission is in the nature of an easement, road commissions will be at risk of having to defend their decisions against claims that their actions intrude on, diminish or prevent the front-tier owners' full use of their riparian rights. A road commission would be faced with claims that its safety or engineering requirements are excessive or unreasonably interfere with the front-tier owners' riparian rights under any of the following circumstances:

> The installation of guardrail along the entire length of a street opposite the front-tier lots, which would prevent the front-tier owners' direct access to the lake.
>
> The imposition of limitations or prohibitions on the construction of structures from the edge of the roadway to provide access to the beach below the level of the road.
>
> Prohibiting or restricting boat or dock storage between the road and the water.
>
> Prohibiting or restricting the construction of ancillary structures such as decks or boat houses opposite front-tier lots.

A decision by this Court reversing the Court Appeals would lead to numerous situations in which front-tier owners would dispute the extent of a road commission's authority within the statutorily dedicated fee as intruding on their riparian rights.

Road commissions should be able to rely on the fact that a statutory dedication in fee conveys the rights of a fee, not a lesser interest in the land, and not an interest the equivalent of an easement. If this Court accepts the position advocated by Appellants, the nature and extent of the fee will be argued repeatedly between road commissions and owners of platted lots separated from navigable water by roads within their plat statutorily dedicated in fee to the public for that purpose.

The interest of county road commissions is to preserve the law under which streets within plats were dedicated that form a portion of the road and street infrastructure under their jurisdiction.

STATEMENT OF ISSUE INVOLVED

The Amici Curiae herein adopt as their Statement of Issue Involved included in the Appellant's Brief.

STATEMENT OF MATERIAL PROCEEDINGS & FACTS

The Amici Curiae herein adopt as their Statement of Material Proceedings and Facts the Statement of Facts included in the Appellant's Brief.

INTRODUCTION

The nature of the fee vested in the public by the statutory dedication of land for a public street is at issue in this case.

In deciding this case, the Plaintiffs and their supporting amici are asking this Court to construe the fee of Beach Drive in Charlevoix Township dedicated to the public for use as a public street that separates Plaintiffs' lots from Lake Charlevoix to be fee in name only, in order that the Plaintiffs may claim riparian rights to Lake Charlevoix from their front-tier lots.

Beach Drive was dedicated in 1911 through the subdivision of land adjacent to Lake Charlevoix, formerly Pine Lake, according to the requirements of the 1887 Plat Act, which read:

> The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of an incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purposes whatever.

The 1887 Plat Act, the plat acts which preceded it, and succeeding plat acts up to 1967 (the "Pre 1967 Plat Acts") all contain similar language providing that the dedication of land for public use as allowed in the statute shall be a sufficient conveyance to vest the fee to such land to the public. In 1967 the Plat Act, now the Land Division Act, MCL 560.101, was amended to provide that all statutory dedications for public purposes vest a fee simple interest in the public to such land.

Appellants are asking this Court to reject well-reasoned opinions of the Court of Appeals and the Trial Court which found that owners of front-tier lots within a recorded plat, separated from a water way by a street dedicated to the public in fee, are not riparian owners. Appellants argue that notwithstanding the language of the statute which clearly states that the statutory dedication of land

for public use through a recorded plat shall be a sufficient conveyance to vest the fee for such land in the public, the language of the statute and the basic principles of property law should be disregarded.

The Pre 1967 Plat Acts are the statutory basis under which hundreds of plats dividing thousands of acres of Michigan land have been recorded. Numerous plats subdivide land adjacent to many of Michigan's 11,000 plus inland lakes. Some of these plats include dedications for public streets along the water separating the front-tier lots from the water in the same way that Beach Drive separates Appellants' lots from Lake Charlevoix. Other plats include streets that end at the water's edge. Yet, in other plats where a dedicated street runs parallel to the edge of a lake, proprietors specifically linked lots along the shore to corresponding lots on the opposite side of the street in order to provide water privileges to the lots adjacent to the street. One example of that practice is found in the 1907 plat of Glenwood Beach Resort, in Cheboygan County attached as Exhibit 1. In the plat of Glenwood Beach Resort the proprietor specifically provided that the small lots opposite lots 26 to 42 along Glenwood Drive were designed to give the owners of lots 26 to 42 water privileges.

There are numerous variations in the manner in which the lots are arranged within plats in relation to the property dedicated for streets and other public purposes.

CRAM submits that the language of the statute clearly vests fee title to all property within a recorded plat dedicated to the public for public purposes, and notwithstanding that the dedication is to the public in trust for a specific purpose the fee includes all of the elements of a fee interest, subject only to the limitation that the property be used for the purpose for which it was dedicated without regard to whether it is adjacent to a water way.

CRAM submits that under all applicable principles of Michigan property law, the Court of Appeals decision affirming the Trial Court decision must be affirmed.

I. THE FEE OF THE PLATTED PROPERTY DESIGNATED AS BEACH DRIVE IS VESTED IN THE PUBLIC.

A. Standard of review.

CRAM agrees with Appellee CCRC that the de novo standard of review is applicable to this appeal to the extent it involves an order on summary disposition, matters of statutory interpretation, or other questions of law.

B. A plat dedication to the public conveys the fee of the dedicated property.

The plat of North Charlevoix was made and recorded in 1911. Thus, the 1887 Plat Act applies. The pertinent statutory language follows:

> The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of an incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purposes whatever.

This principle is stated succinctly in Michigan Land Title Standard 13.1; which provides:

> The recoding of a plat in compliance with the plat act then in effect is a conveyance of a qualified fee title in the parcels of land designated for public use to the municipality in which the platted land is located, in trust only for the uses and purposes designated, unless the dedication is withdrawn before it is accepted by the municipality but after a reasonable time for acceptance has elapsed.

In interpreting the 1887 Plat Act, if the language is plain and unambiguous courts must apply the statute as written, making judicial construction unnecessary. *Oneida Twp City v City of Grand Ledge*, 282 Mich App 442, NW2d (2009). In *Cain v Waste Management*, 472 Mich 236; 697 NW2d 130 (2005), this Court has stated that in construing a statute, the primary goal is to give effect to the intent of the Legislature beginning with reviewing the language of the statute itself. Citing the approach to construction of statutes that the legislature enacted, MCL 8.3a:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. MCL 8.3a.

Clearly, the 1887 Plat Act indicates that a plat is a sufficient conveyance to vest the fee of the dedicated land for public uses.

In 1846 this Court stated that the clear purpose of an earlier plat act was to obviate problems caused by the application of the common law principles of dedication by providing for vesting of the fee in the county:

> This statute, as is apparent on its face, was designed to provide an explicit mode for the dedication of streets and other grounds designed for public uses, upon the laying out of towns by individual proprietors, and to render the rights of purchasers, and the public generally, in grounds thus dedicated, definite and certain. It also obviated the difficulty met with in some of the cases in the application of common law principles of dedication, in regard to ownership of the fee, by providing that, upon compliance with the provisions of the act, this should vest in the county, in trust for the designed uses. *People v Beaubien*, 2 Doug. 256, (1846).

Appellants argue that the dedication at issue here merely transferred a limited fee for the sole purpose of maintaining the road, and did not have any effect on the front-tier lot owners' riparian rights. This interpretation is based on the rationale that unless the dedication expressly grants a *fee simple absolute* the conveyance imposes rigid limits on the *base fee* that is transferred to the public. This interpretation, however, reads a limited usage into the dedication that does not exist. Appellants' interpretation is inconsistent with the rules of statutory construction. Further, Appellants' interpretation is inconsistent with Michigan case law that explains that the statutory intent of vesting the fee in the appropriate public entity in trust was to eliminate the difficulty in the application of the common law principle of dedication in regard to ownership of the fee.

C. A qualified or base fee is a fee.

Black's Law Dictionary defines a fee as "an inheritable interest in land" and denotes an interest that is "the broadest property interest allowed by law...." Hence, a conveyance under the 1887 Plat Act grants fee title in the public limited to the uses and purposes designated in the plat. The Court of Appeals noted that the type of fee conveyed by the dedication at issue here does not indicate a fee simple absolute. It is unnecessary that the fee dedicated to the public be a fee simple absolute.

The term "base fee" is used in the sense of a fee that has a qualification annexed to it. *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939). Because the estate may last forever, a qualified fee is a fee; and because it may end on the happening of an event, it is called a "determinable or qualified fee." 2 Am Jur Estates, Section 26.

Where a qualified fee is determinable upon an event which is certain to happen, there is a true reversion, and not a possibility of reverter. While the public is limited in how the fee may be used, that limitation does not negate the fee because the estate may last forever. Notwithstanding that a possibility of reverter exists, the fee except for the possibility of reverter remains a fee in all other respects.

D. The fee conveyed to the public for the purpose includes riparian rights.

This Court has affirmed and never deviated from the rule that riparian rights may never be severed from the Fee. *Thomson v Enz*, 379 Mich 679, 154 NW2d 473 (1967).

In *Little v Kin*, 249 Mich 502, 644 NW2d 375, (2002); aff'd 468 Mich 699, 664 NW2d 749 (2003) *app. den. after remand; Little v Trivan*, 477 Mich 907, 722 NW2d 814 (2006), recognized this Court's unequivocal statement that riparian rights may never be severed from the fee stated in *Thomson v Enz, supra*, and held; "that, while full riparian rights and ownership may not be severed

from riparian land and transferred to nonriparian backlot owners, Michigan law clearly allows the original owner of riparian property to grant an easement to enjoy certain rights that are traditionally regarded as exclusively riparian." P. 504.

Appellants claim that they hold the fee to Beach Drive opposite their lots. They maintain this position even though their deeds do not extend to Beach Drive. Appellants do not hold the fee because under the Plat Act of 1887 and under the predecessor plat acts and each subsequent plat act through 1967, a dedication of property for public use conveys a fee to the public in trust for the stated public purpose.

Appellants maintain that they control the riparian rights from the property conveyed in fee to the public for use as a street. Appellants did not receive an easement conferring the right of access to enjoy access to Lake Charlevoix, nor were such rights reserved in the dedication of the North Charlevoix Plat, nor were such rights granted or reserved to them in the deeds to their lots. Nothing can be inferred from the language of the plat or the arrangement of the front-tier lots in relation to Beach Drive that even suggests that the front-tier lots were to have riparian rights and easement for access or "water privileges" separate from the public. To the contrary had it been intended that the front-tier lots were to have riparian rights, the plat could have provided as such in a number of ways, as did the proprietor of the Plat of Glenwood Beach Resort, Exhibit 1, in assuring water privileges to lots 26 to 42.

E. Appellants' claim that they control the riparian rights of property within a properly recorded plat is inconsistent with public policy and the statutes controlling access to water from roads ending at, or adjacent to waterways.

Public policy in Michigan favors continued access to waterways from public roads that end at, or are adjacent to waterways. Unlike other dedications that may have been made to the public that would terminate upon cessation of the use for the purpose to which the land was dedicated, abandonment of any road may not be accomplished until a lengthy procedure is completed and the

abandonment is approved by the Circuit Court in the county where the road is located. MCL 224.18, MCL 247.41, MCL 252.2.

Section 18 of Chapter IV of the County Road Law, 1909 PA 283, as amended, MCL 224.18 provides in relevant part:

> (5) . . .
> The township board of the township in which the road is situated shall have first priority to retain the property or portion of the property. The board shall also notify the township or municipality within which the road is situated, the state transportation department, and the department of natural resources if the action concerns any county road or portion of a county road that borders on, crosses, is adjacent to, or ends at a lake or the general course of a stream and the proposed action would result in the loss of public access. If the owner does not reside upon the land or the owner of record or occupant cannot be found within the county in which the land is situated, the notice to the owner of record or occupant of the land shall be served by posting in 3 public places in the township in which the road is situated, and by publication in a newspaper circulated within the county, 30 days before the time of hearing. Notice shall be served upon railroad companies by leaving a copy with the agent in charge of any ticket or freight office of the company operating the railroad, on the railroad line. The department of natural resources and the township or municipality within which the road is situated shall review the petition and determine within 30 days whether the property should be retained as an ingress and egress point. If the road is situated in a township, the township shall have first priority and the department of natural resources shall have second priority to retain the property as an ingress and egress point. If the road is not situated in a township, the department of natural resources shall have first priority to retain the property as an ingress and egress point.
>
> . . .
>
> (8) Subject to subsection (5), if the board of county road commissioners determines pursuant to this section to relinquish control, discontinue, abandon, or vacate any county road or portion of a county road that borders on, crosses, is adjacent to, or ends at a lake or the general course of a stream and the township, if applicable, or the department of natural resources decides to maintain the road as a public access site, it shall convey by quitclaim deed or relinquish jurisdiction over the property if the interest is nontransferable to the township or the state. If the township obtains the property or jurisdiction over the property as an ingress and egress point and later proposes to transfer the property or jurisdiction over the property, it shall give the department of natural resources first priority to obtain the property or jurisdiction over the property. If the state obtains the property or jurisdiction over the property under this subsection, the property shall be under the jurisdiction of the department of natural resources. The state may retain title to the property, transfer title to a local

unit of government, or deed the property to the adjacent property owners. If the state has purchased the property with restricted fund revenue, money obtained from sale of the property shall be returned to that restricted fund. The local unit of government shall either maintain the property as a site of public access or allow it to revert to the adjoining landowners.
(9) Subject to subsection (5), if the board of county road commissioners determines pursuant to this section to abandon any county road or portion of a county road to a township, it shall quitclaim deed the property if the interest is nontransferable to the township. The township shall either retain the property or allow it to revert to the adjoining landowners.
(10) Within 30 days after final determination upon the petition for absolutely abandoning and discontinuing a highway, the board of county road commissioners shall file with the state transportation commission a full record and return of its proceedings. A determination by the board of county road commissioners under this section is binding for purposes of 1927 PA 341, MCL 247.41 to 247.46.
(11) The board of county road commissioners may reserve an easement for public utility purposes within the right-of-way of any road absolutely abandoned and discontinued under this section and may, by resolution, extinguish any easement so reserved whenever the easement ceases to be used for public utility purposes.
(12) If interest in the property is conveyed or control over the property is relinquished to a local unit or this state under subsection (8), the local unit or this state, as applicable, shall operate and maintain the property so as to prevent and eliminate garbage and litter accumulation, unsanitary conditions, undue noise, and congestion as necessary. MCL 224.18(5), (8)-(12).

The statute regarding discontinuation of highways bordering a lake or stream by city or village officials, 1927 PA 341, as amended, MCL 247.41 et seq., requires:

Sec. 1. A public highway or a portion of a public highway that borders upon, crosses, is adjacent to, or ends at a lake, or the general course of a stream, shall not be abandoned, discontinued, vacated, or have its course altered resulting in a loss of public access by the order or action of an official or officials of a city or village in this state, until an order authorizing the abandonment, discontinuation, alteration, or vacation is made by the circuit court for the county in which the highway is situated in the manner provided in this act. MCL 247.41
Sec. 2. If the official or officials having jurisdiction over the highways of a village or city in this state desire to abandon, discontinue, vacate, or alter the course of a public highway referred to in section 1, and the abandonment, discontinuation, vacation, or alteration will result in the loss of public access, before any action is taken by the public official or officials of a village or city, an application signed by not less than 21 landowners of the village or city in which the highway is situated, shall be made to the circuit court for the county in which the highway is located, setting forth the particular circumstances of the case, an accurate description of the highway proposed to be abandoned, discontinued, vacated, or altered, together with the reasons for the proposed abandonment, discontinuation, vacation, or alteration. The application shall

be substantiated by oath by 5 or more of the persons signing the application. MCL 247.42.

Similar language was included in MCL 560.226(2), section 226 of the Land Division Act, 1967 PA 288, as amended, MCL 560.101, et seq.

> (2) If a circuit court determines pursuant to this act that a recorded plat or any part of it that contains a public highway or portion of a public highway that borders on, crosses, is adjacent to, or ends at any lake or the general course of any stream, should be vacated or altered in a manner that would result in a loss of public access, it shall allow the state and, if the subdivision is located in a township, the township to decide whether it wants to maintain the property as an ingress and egress point. If the state or township decides to maintain the property, the court shall order the official or officials to either relinquish control to the state or township if the interest is nontransferable or convey by quitclaim deed whatever interest in the property that is held by the local unit of government to the state or township. The township shall have first priority to obtain the property or control of the property as an ingress and egress point. If the township obtains the property or control of the property as an ingress and egress point and later proposes to transfer the property or control of the property, it shall give the department of natural resources first priority to obtain the property or control of the property. If the state obtains the property or control of the property under this subsection, the property shall be under the jurisdiction of the department of natural resources. The state may retain title to the property, transfer title to a local unit of government, or deed the property to the adjacent property owners. If the property was purchased from restricted fund revenue, money obtained from sale of the property shall be returned to that restricted fund. MCL 560.226(2).

The procedure is similar under all three statutes.

Under MCL 224.18 which governs abandonments by road commissions, if a road commission abandons a road, the Department of Natural Resources or the township in which the road is located may elect to maintain the road as a public access site to the water from the road that the road commission proposes to abandon. Only if the township or Department of Natural Resources decline to maintain water access from the property will the reverter in favor of the front-tier owners become effective.

A decision by this Court that accepts the Appellants' contention that they hold the fee, or that they control the riparian rights from Beach Drive, would conflict with the public policy of the

State of Michigan and conflict with other existing statutes regarding protection of access to Michigan's waterways from public roads ending at or adjacent to water.

II. CASE LAW THAT STATES THAT FRONT-TIER LOTS ADJACENT TO A ROAD RUNNING ALONG A WATER WAY HAVE RIPARIAN RIGHTS UNLESS SUCH RIGHTS ARE EXPRESSLY EXCLUDED IS NOT VALID WITH REGARD TO A ROAD DEDICATED TO AND ACCEPTED BY THE PUBLIC AS PART OF THE PLAT.

A. Standard of review.

CRAM agrees with Appellee CCRC that the de novo standard of review is applicable to this appeal to the extent it involves an order on summary disposition or other questions of law.

B. *Thies v Howland* which supports the decisions by the lower courts is the correct statement of the law regarding riparian rights of front-tier lot owners separated from a waterway by a road dedicated to and accepted by the public as part of a plat.

The question that the Court asked the parties to address cannot be answered without regard to the facts of each case decided. The cases in which a statement that front-tier lots adjacent to a road running along a waterway have riparian rights unless such rights are expressly excluded are not valid with regard to a road dedicated to the public in fee and accepted by the public as part of a properly established plat. However, those cases in which a statement that front-tier lots adjacent to a road running along a water way have riparian rights unless such rights are expressly excluded may be valid as applied to cases in which the road exists by use, a common law dedication, a pre 1967 private dedication, or within an improperly established plat.

Justice Cavanaugh has set out the basic rule of property law applicable in this case in this Court's decision in *Thies v Howland*, 424 Mich 282, 380 NW2d 463 (1985).

> "While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway or street is in the owner of the land, riparian rights remain in such

owner.". 78 Am Jur 2d, Waters, § 273, p. 716. See also 79 Am Jur 2d, Wharves, § 5, p. 179; 1 Farnham, Water & Water Rights, § 144, pp. 666-667; Plager & Maloney, *Multitude Interests in Riparian Land, Subdivision Platting, and The Allocation of Riparian Rights*, 46 U Det Urb 41, 50 (1968)." *Thies,* p. 290.

This statement of the law from *Thies* is a succinct statement of the law that is consistent with principles of property law. Counsel for CCRC has ably noted the distinctions among the cases which suggest that the statement of the applicable law quoted above from *Thies* is inapplicable. CRAM fully agrees with CCRC's analysis.

Any examination of the pre and post *Thies* cases to determine their continued validity should be based on an examination of the unique facts and circumstances on which those decisions were based. To the extent that those cases are inconsistent with *Thies* they are not valid.

Unfortunately, some of those decisions lack the precision one would like. Often these cases were decided on the facts without providing a clear statement of the law on which the Court relied. An early example is in *County of Wayne v Miller,* 31 Mich 447 (1877), where this court considered whether a street existed because of a failed dedication. In *Wayne v Miller*, the Court raised a question as to the nature of the title conveyed to the public through a completed dedication under the 1839 Plat Act. Unfortunately the Court deemed it unnecessary to answer, indicating those questions must be dealt with when they arose, notwithstanding its 1846 decision in *People v Beaubien, supra*, in which the statutory intent of vesting the fee in the appropriate public entity in trust was to eliminate the difficulty in the application of the common law principle of dedication in regard to ownership of the fee.

A more recent example of imprecise citation of authority occurred in *Jonkers v Summit Township*, 278 Mich App 263, 747 NW2nd 901 (2008). *Jonkers* had several issues related to whether the Plaintiffs' land was riparian. One issue concerned whether a survey error occurred and whether a portion of Plaintiffs' land no longer touched the water due to reliction. Plaintiff's property

was separated from the water by a public road dedicated in a recorded plat. The Court of Appeals, ignoring *Thies*, quoted the following principle of law from *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), "the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights." Without recognizing that in *Croucher*, *supra*, the highway separating the land bordering the water from the Plaintiff's land was a highway by user that by law existed on an easement.

Counsel for CCRC has ably noted the distinctions among the cases which suggest that the statement of the applicable law quoted above from *Thies* is inapplicable. CRAM fully agrees with CCRC's analysis.

This Court now has the opportunity to properly reconcile the apparent inconsistencies that have caused this type of confusion in deciding the exact nature of the property owned by front-tier lot owners adjacent to a road running along a water way.

There is a parallel case in Michigan jurisprudence regarding a series of conflicting decisions involving property rights and road dedications under the highway by user statute, MCL 221.20. For years the interpretation of highway by user statute was the subject of a number of appellate decisions that could not be easily reconciled. Each case involved factual differences. Often the decisions included references to the principles of adverse possession or prescriptive rights in interpreting the highway by user statute as it appeared to the reviewing courts that elements of those concepts applied. Alternatively, the reviewing courts simply misused the terminology of adverse possession and prescriptive rights in deciding those cases. The reported appellate decisions in which the statute was applied and interpreted were confusing and inconsistent until this Court issued its decision in *Kentwood v Sommerdyke Estate*, 458 Mich 642, 581 NW2d 670 (1998), *cert. den. Sommerdyke Estate v City of Kentwood*, 526 US 1003, 119 S Ct 1140, 143 L Ed 2d (1999). In *Kentwood*, *supra*,

this Court explained the common law highway by user rule which is based on the concept of an implied dedication, the modification of the common law rule by our statute, distinguished implied dedication from adverse or prescriptive use, and described how the statute was to be applied.

In 1998 this Court issued a decision in which the Court provided a definitive interpretation of the highway by user statute that provided the courts, the bar, property owners and road agencies clear guidance on the application of the highway by user statute.

As early as 1846 the Michigan Supreme Court in *People v Beaubien*, *supra*, recognized the purpose of providing for dedication of streets in plats was to avoid the problems in the application of common law principles of dedication. This case presents a similar opportunity for the Court to restate and reaffirm the principle of law clearly articulated in *Thies* consistent with the purpose of the Pre 1967 Plat Acts as articulated in *People v Beaubien*, *supra*.

CONCLUSION

Consistent with the principles of property law in Michigan, there can only be one fee title in a given parcel of land. Appellants have no fee interest in the land dedicated in fee for use as Beach Drive. Riparian rights cannot be severed from a fee. To the extent that a riparian owner may grant an easement for use of certain of the owner's riparian rights, in this case no such easement exists nor was there any indication that the proprietor had an intent to reserve a right of access for the use of the owners of lots in the Plat of North Charlevoix. A decision of this Court reversing the Court of Appeals would be contrary to the purpose of vesting the fee in the public to eliminate the difficulty in the application of the common law principle of dedication.

Dated: July 20, 2010

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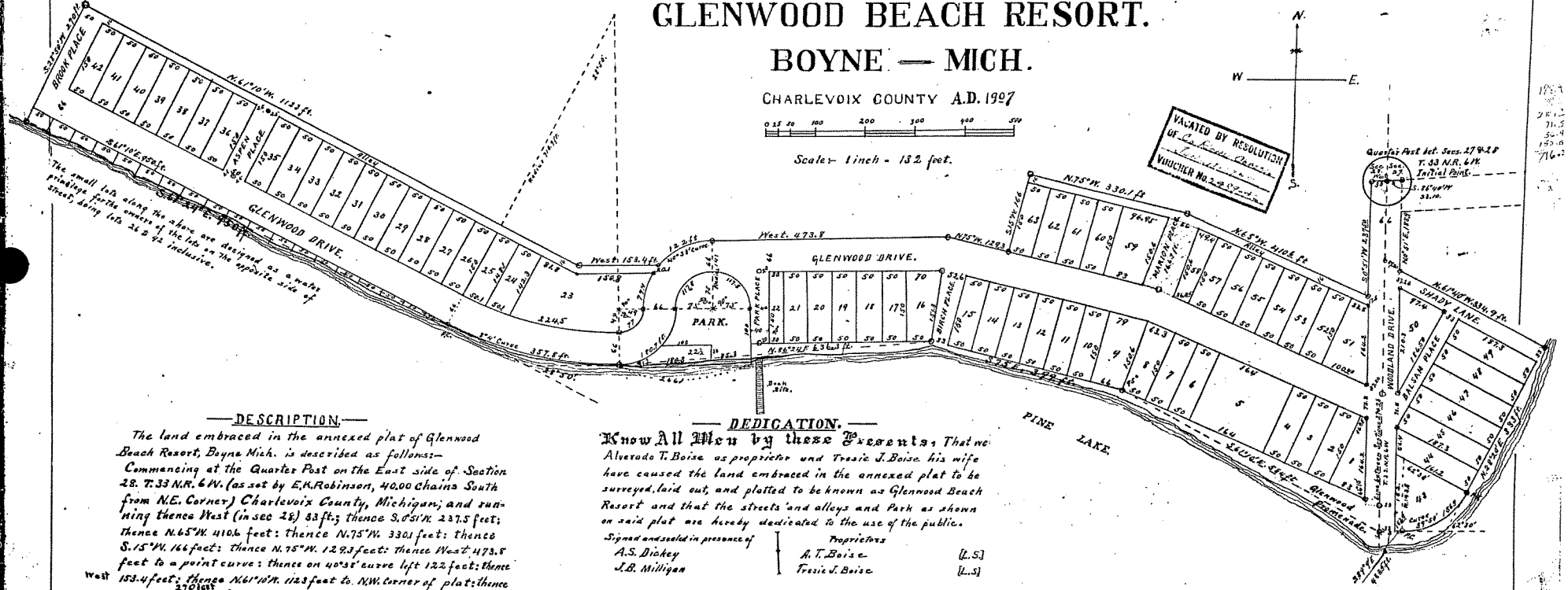
GLENWOOD BEACH RESORT.

BOYNE — MICH.

CHARLEVOIX COUNTY A.D. 1907

Scale- 1 inch - 132 feet.



DESCRIPTION.

The land embraced in the annexed plat of Glenwood Beach Resort, Boyne Mich. is described as follows:- Commencing at the Quarter Post on the East side of Section 28. T.33 N.R. 6W. (as set by E.K.Robinson, 40.00 Chains South from N.E. Corner) Charlevoix County, Michigan; and running thence West (in sec 28) 83 ft.; thence S.0°51'W. 227.5 feet; thence N.65°W. 410.6 feet: thence N.75°W. 330.1 feet: thence S.15°W. 166 feet: thence N.75°W. 1293 feet: thence West 473.8 feet to a point curve: thence on 40°55' curve left 122 feet: thence West 153.4 feet: thence N.61°10'W. 1123 feet to N.W. Corner of plat: thence S.28°50'W. to an iron post near edge of water in Pine Lake: thence S61°24'E. along the lake shore 950 feet to the point curve in southerly side of Glenwood Drive (S.); thence on curve of 9°40' left 357.5 feet (the course of first 100 ft. of curve being S.65°12'E.): thence N.86°24'E. 636.3 feet: thence S.75°E. 399 feet: thence S.61°10'E. 584 feet to line between Sections 27 & 28 as located by E.K. Robinson, Co. Surveyor: thence in Section 27 S.89°9'E. 45.25 feet to a point curve: thence on 39°50' curve left (Radius 1872 ft) 1567.0 feet to point Tangent: thence N.28°20'E. 333. feet: thence N.61°40'W. 334.9 feet: thence N.0°51'E. 188.9 feet to E. & W. Quarter line of Sec. 27.: Thence S.86°46'W. 33 feet on said quarter line to the place of beginning. The plat occupying a part of Lot 1. Sec 27 and part of Lots 1 and 2 of Sec. 28.

STATE OF MICHIGAN } ss.
County of Charlevoix }

We R.A.Emrey, Register of Deed and E.A.Robinson, Surveyor, hereby certify that we have each carefully compared the annexed copy with the plat of Glenwood Beach Resort now of record in the office of said Register of Deeds, and that it is a true transcript therefrom and of the whole of such record

Romeo A. Emrey ..... Register of Deeds
E.A. Robinson ..... Surveyor.

DEDICATION.

Know All Men by these Presents: That we Alverado T. Boise as proprietor and Tresie J. Boise his wife have caused the land embraced in the annexed plat to be surveyed, laid out, and platted to be known as Glenwood Beach Resort and that the streets and alleys and Park as shown on said plat are hereby dedicated to the use of the public.

Signed and sealed in presence of — Proprietors

A.S. Dickey — A. T. Boise [L.S.]
J.B. Milligan — Tresie J. Boise [L.S.]

STATE OF TENNESSEE } ss.
County of HAMILTON }
City of CHATTANOOGA }

On this 9th day of May A.D. 1907 before me a Notary Public in and for said county personally came the above named Alverado T. Boise and Tresie J. Boise, his wife, known to me to be the persons who executed the above dedication, and acknowledged the same to be their free act and deed.

A.S. Dickey
Notary Public Hamilton County Tennessee.
My commission expires 8 August 1908.

RECEIVED AND FILED. IN AUDITOR GENERAL'S OFFICE. June 25 1907 John F. Wilkinson Deputy Auditor General.

NOTARY PUBLIC HAMILTON COUNTY

STATE OF MICHIGAN } ss.
County of Charlevoix }

We R.A Emrey Register of Deeds and E.A. Robinson Surveyor, hereby certify that we have each carefully compared this copy with the original plat of Glenwood Beach Resort and that it is an exact copy thereof and of the whole of such original map or plat.

Romeo A. Emrey ..Register of Deeds.
E. A. Robinson .....Surveyor.

SURVEYOR'S CERTIFICATE.

I hereby certify that the plat hereon delineated is a correct one and that permanent monuments consisting of 1/2 inch iron pipe 5 feet or more in length have been placed at points marked thus "o" as thereon shown at all angles in the boundaries of the land platted, and at all intersections of streets, or streets and alleys. Each lot is also staked.

E. A. Robinson Surveyor.
Charlevoix County Michigan.

Examined and approved June 25th 1907
John F. Wilkinson.
Deputy Auditor General.

REGISTERS OFFICE, CHARLEVOIX COUNTY, Ss.
Received for Record the 6th day of July A. D. 1907 at 4 o'clock P. M. and Recorded in Liber 1 of Plats on Page 45
Romeo A. Emrey Register of Deeds

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